Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN L. "JACK" DADDONA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether an attorney's file memo containing his mental impressions and lay opinion of non-verbal conduct by a criminal defendant and which contradicts the attorney's own live testimony at trial that the defendant said and did nothing incriminating was properly admitted under F.R.E. 701?

II. Whether *McNally v. United States* requires reversal of a conviction for mail fraud and conspiracy to commit mail fraud where another trial court subsequently holds that the victim of the mail fraud (and the recipient of the allegedly false mailing denying a claim under a surety bond), who testified for the Government at trial, in fact, had no right to claim under the bond so that the victim could not have been deprived of anything of value within the meaning of 18 U.S.C. §1341?

III. Whether an unconstitutional denial of due process occurs where a trial court in a criminal case erroneously believes it has no subject matter jurisdiction to adjudicate a motion for new trial filed during the pendency of an appeal and, therefore, fails to reach the merits of the new trial motion so that the sufficiency of the new trial motion is never adjudicated and the conviction is affirmed?

IV. Whether court orders directing a criminal defendant not to file motions, denying a hearing on a new trial motion and denying requests for discovery amount to violations of the defendant's First, Fifth and Sixth Amendment rights?

LIST OF ALL PARTIES TO THE PROCEEDING

The United States and petitioner are the parties to this proceeding. Sidney Cohen, petitioner's co-defendant at trial, was party to the appeal below; but Cohen has not filed a petition for certiorari and his appeal has been remanded to the trial court for re-sentencing.

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OPINION BELOW

The opinion of the Court of Appeals below (Appendix 94, *infra*) is not reported. The opinions of the District Court below (Appendix 72a-93a, *infra*) are not reported.

GROUNDS OF THIS COURT'S JURISDICTION

The judgment of the Court below (Appendix 94a, *infra*) was entered on August 17, 1994. Rehearing was not sought. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The portions of the United States Constitution implicated by this Petition are the following:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The statutes under which Petitioner was prosecuted are the federal mail fraud statute and the federal conspiracy statute, which provide as follows:

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, place in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The admissibility of the so-called Leiderman Memo was governed by Federal Rule of Evidence 701, which provides:

> **Rule 701. Opinion Testimony by Lay Witnesses**
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

The issue of whether the Trial Court had subject matter jurisdiction to adjudicate the merits of Daddona's motion for new trial arises under Rule 33 of the Federal Rules of Criminal Procedure, which provides that:

> **Rule 33. New Trial**
>
> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment it entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after the final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

Daddona was indicted in the United States District Court for the Middle District of Pennsylvania on July 28, 1992.

The indictment (60a) alleged that Daddona conspired with his co-defendant, Sidney Cohen ("Cohen"), and one Daniel Culnen ("Culnen") to commit mail fraud and, furthermore, participated in two acts of mail fraud in connection with claims made on a performance bond and a labor and materials bond issued by Employers Insurance of Wausau. The claims arise out of the construction of an apartment house project in Harrisburg known as Green Hill Associates. Daddona's company, Eastern Consolidated Utilities ("ECU"), had been the replacement general contractor on the project.[1]

Cohen, the developer of Green Hill, was also charged in the same indictment with three additional offenses: conspiracy to transport a fraudulently obtained security in interstate commerce (Count I), interstate transportation of a fraudulently obtained security (Count II) and interstate transportation of a fraud victim (Count VI). (60a-71a).

The gist of the charges was that Daddona had conspired in 1987-88 with Culnen (his insurance agent) and Cohen (the developer of Green Hills) to deceive Employers Insurance of Wausau ("Wausau"), the obligor on the bonds, certain subcontractors on the Green Hills job and the project's lender into believing that the bonds were not validly issued when, in fact, they were. (Count III; 64a). Culnen, Wausau's agent, admitted furnishing false information to Wausau which became the basis for the two mailings by Wausau which were alleged as the basis of the mail fraud charges, *to wit*: two "denial of claim"

1. ECU, at the time of the events charged in the indictment, was a company which had over $3 million in net worth, contracts for work-in-process of over $15 million, jobs in three states and 250 employees. ECU lost $554,000 on the Green Hills project and is now in liquidation. Daddona, who, at the time these charges were brought, was a successful and prominent real estate developer, golf course owner and stone quarry operator, is now essentially un-bondable.

Daddona has had no previous contact with the justice system.

letters dated April 26, 1988 sent by Wausau to two subcontractors who had made claims under the labor and materials bond:

— John Meyers of Construction Management Corporation (69a; Count IV); and

— Leslie D. Stewart of York Excavating (70a; Count V).

Following a five-day trial on September 14-18, 1992, Daddona and Cohen were convicted. Proceedings to determine the amount of the "loss" caused by Daddona's fraud, as required by the Sentencing Guidelines, were held on March 30, and April 2, 1993. Daddona was sentenced to nine months incarceration on May 6, 1993.

On May 14, 1993, Daddona appealed the judgment of conviction and sentence. After Daddona's new trial motion was filed, the trial court issued an order on June 4, 1993, cancelling Daddona's sentencing date. (20a; Docket #121). Daddona remains free on bail.

On August 17, 1994, the Court of Appeals affirmed Daddona's conviction without discussion[2], but overturned his sentence.

By order dated September 23, 1994, upon Daddona's motion, the Court of Appeals stayed issuance of its mandate to permit this petition. (47a).

STATEMENT OF FACTS RELEVANT TO THIS PETITION

A. The Leiderman Memo

At trial, no direct evidence was offered by the Government of Daddona's participation in Culnen's admitted fraud.[3] One key piece of evidence offered by the Government was admitted over objection: a lawyer's file memo which recorded his mental impressions and lay opinion of a meeting with Daddona.

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2. The sole reference to Daddona's appeal of his conviction appears in footnote 12 of the opinion. (106a).

3. Culnen had previously pleaded guilty. The sentencing court found that he had acted alone. Every Government witness — including Culnen — testified at trial that Daddona never represented the Bonds were invalid.

The so-called Leiderman Memo, quoted in full below, was highly damaging to the defense. It said:

> On 3-17-88 MRL [Mitchell R. Leiderman] met with "Jack" Daddona of ECU. He, through innuendo, made accusations that the performance bond provided to Green Hill by ECU and then by Green Hill to Summit Tax Exempt Bond Fund was in some way not valid and was not obtained legitimately. He provided no proof and would not state this directly.

(120a).

Attorney Leiderman (the developer's lawyer) testified, however, that Daddona had made no incriminating statements to him. (115a-134a). In addition, the following exchange took place with the Court:

> Q What did Mr. Daddona say to you that made you infer that it was something about the bonds' validity?
>
> A He said nothing.
>
> THE COURT: The witness didn't say that he inferred it because of something Mr. Daddona said. He said he inferred it.
>
> THE WITNESS: That I inferred it.
>
> THE COURT: You inferred it but not based on what Mr. Daddona said?
>
> THE WITNESS: Exactly, Your Honor. (119a).

The Trial Court permitted the testimony.

B. The Alleged False Mailing to York Excavating

Subsequent to Daddona's conviction, another U.S. District Court issued a detailed opinion denying a claim made under the Wausau bond by one of Daddona's supposed victims. (154a). That District Court held that York Excavating, the sub-contractor who was the recipient of the false mailing charged in Count V, in fact, *had no legal right to claim under the bond.* (163a-168a). Therefore, York could not possibly have been defrauded by Daddona by means of the mailing charged in Count V.

Daddona's supposed wrongdoing did not result in a "deprivation of money or property" from York. Moreover, the testimony by York's president at Daddona's trial (135a-153a) that it had a contract with ECU, that York relied on the L&M Bond, and that York had been injured as a result fatally tainted the entire proceedings.

Thus, at a minimum, Daddona is entitled to an acquittal on that mail fraud count, and to a new trial on the other mail fraud count and the conspiracy count.

C. Daddona's "New Trial" Motions

On May 21, 1993, five days after taking his initial appeal in this case, Daddona filed a motion for new trial based on after-discovered evidence. (107a; Docket #114). The evidence upon which it was based was evidence which had come into Daddona's possession during the previous weeks.

Because of Daddona's unexpected sentence of incarceration, individuals who previously had been uncooperative with Daddona (including supposed victims and former witnesses for the Government) came forward to offer evidence suggesting the existence of material, exculpatory evidence and impeachment materials in the Government's possession. Daddona's efforts to place these matters before the Trial Court while his appeal was already underway resulted in complex procedural maneuvering and inconsistent rulings by the Trial Court and a Motions Panel of the Court of Appeals.

First, on June 3, 1993, Daddona motioned the Court of Appeals to remand this appeal in light of his new trial motion. Initially, the District Court ruled that it lacked jurisdiction to decide the new trial motion at all. (82a). On June 4, therefore, the District Court cancelled the reporting date for Daddona. Daddona continued his investigation and took several *ex parte* depositions.

These depositions showed that (a) exculpatory and impeachment materials had indeed been withheld; and (b) the Trial Court's subpoena power and an order to the U.S. Attorney for limited discovery were necessary to complete properly the record on Daddona's motion. On June 28, therefore, Daddona

filed a motion for leave to take discovery, to employ the subpoena power of the Court and to obtain certain limited discovery from the government. (22a; Docket #131).

He also requested a hearing. The Trial Court summarily denied that motion on July 1, before Daddona's brief and evidence in support of it had even been filed. (22a; Docket #132; 81a). The Trial Court also ruled—again—that it had no subject matter jurisdiction to decide the new trial motion. (82a). Daddona filed a timely motion to reconsider, with his brief and the transcripts on July 7. (22a; Docket #133). The trial court on July 7 then stayed consideration of that motion pending remand. (84a).

No remand occurred. On August 4, the Motions Panel of the Court of Appeals denied Daddona's motion to remand. Daddona immediately moved the Court of Appeals on August 7 to reconsider its denial of the remand motion. While that was pending, the Trial Court, sua sponte, ruled that it *did* have jurisdiction to decide the original new trial motion; and did so on September 23, 1993. (85a).

In the course of its opinion, the Trial Court stated:

> [X] was a key Government witness on the issue of loss caused by Defendant's fraud . . .
>
> * * *
>
> A prosecutor has the duty to make available to a defendant exculpatory evidence as well as evidence that might impeach a government witness . . . A failure to so notify a defendant violates due process and is cause for reversal of a conviction.
>
> * * *
>
> [W]hile we acknowledge that the Government had a duty to disclose to defendants any evidence that might have impeached [X], nothing in the two proffered statements indicates that the Government had any such knowledge.

(86a).

However, the Trial Court did not discuss any of the evidence attached to Daddona's brief in support of his motion for leave to take discovery which, in fact, dealt with this key witness. Moreover, the Trial Court denied, without discussion, Daddona's motion to reconsider its earlier ruling denying the motion for leave to take discovery. (85a). It did not discuss the evidence filed in the July 7 brief.

Three days later, the Court of Appeals again denied Daddona's motion to remand.

In light of the Trial Court's incomplete adjudication of the new trial motion, Daddona on October 15 filed a "renewed motion for new trial", attaching all of the previously overlooked evidence (already filed once with the Trial Court on July 7), together with one additional transcript. (24a; Docket #145). Daddona's brief showed how this evidence squarely met the standard announced by the Trial Court in its September 23 opinion.

Two days later, however, the Trial Court, again without waiting for the Government's brief, issued a three-page opinion and order summarily denying the "renewed motion" without discussing the merits of Daddona's submission. (91a). It also ordered Daddona to file no more motions. (*Id.*).

The final irony, perhaps, was the Motions Panel's disposition of a simple scheduling motion which Daddona had filed to consolidate his appeals and to stay briefing until a decision by the District Court on the "renewed motion for new trial." (42a). The Motions Panel of the Court of Appeals on October 27, 1993, granted the request for consolidation and a single briefing schedule; but it *denied* Daddona's motion to stay the appeal pending a decision by the District Court.

Instead, the Motions Panel said:

> The request to stay the appeals pending disposition by the district court of the motion for a new trial is denied. In the absence of a motion to remand, it appears the district court would lack jurisdiction. *See*,

e.g., *United States v. Davis*, 924 F.2d 501 (3d Cir. 1991).

(93a).

The *Davis* case was (a) the basis for Daddona's two motions for remand (which the Court of Appeals denied) and (b) the basis for the District Court's initial ruling that it lacked subject matter jurisdiction[4].

As of today, no court has adjudicated whether the evidence attached to Daddona's July 7, 1993 submission affords him a basis for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING THE LIEDERMAN MEMO.

At trial, the Government called Mitchell R. Liederman, Esquire, Cohen's former lawyer, to testify against Daddona. (115a-134a). He testified that he met with Daddona on March 17, 1988. After Liederman had testified that Daddona had engaged in no affirmative conduct suggesting that the bonds were invalid, the prosecutor showed him a copy of his own file memo.

The so-called Leiderman Memo may be characterized in several ways. Whatever characterization is used, however, it is plain that its admission was a gravely prejudicial error.

Preliminarily, the Liederman Memo legally constituted attorney-work product belonging to attorney Liederman. On March 17, 1988, Leiderman (attorney for the developer) was interviewing Daddona (the prime contractor) about a construction project on which the developer (Cohen) had defaulted on the project financing and was being sued by the lender,

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4. Interestingly, the Trial Court flip-flopped for a *second* time on January 12, 1994. There, the Trial Court found it had no jurisdiction to decide a motion by Cohen's counsel to withdraw as counsel because the appeal "divested [the court] of jurisdiction over virtually all proceedings," *citing*, *Venen v. Sweet*, 758 F.2d 117, 120 (3rd Cir. 1985).

all contractor work had stopped because of non-payment—although Daddona, the prime, was not in default, and two subcontractors had made bond claims.

Liederman's mental impressions as to Daddona's credibility as a witness (Daddona was then owed $554,000 by Leiderman's client and would soon sue Cohen) is classic attorney work-product. Moreover, there was ample testimony which should have alerted the Trial Court to the impropriety of the introduction of that evidence. Pretending that it was "opinion" or pretending that it memorialized a prior statement by Daddona is, to put it politely, disingenuous. So is the old stand-by: credibility is for the jury. How does defense counsel cross-examine the Liederman Memo?

Federal Rule of Evidence 701 provides that, if a witness is not testifying as an expert, the witness' testimony in the form of an opinion or an inference is limited to those opinions or references which are (a) rationally based on the perception of the witness or (b) helpful to a clear understanding of the witness' testimony on the determination of the fact at issue. Thus, the mental impressions of counsel are almost always inadmissible. *Schindler v. United States*, 221 F.2d 743 (9th Cir. 1955), *cert. denied*, 350 U.S. 938 (1956); *United States v. Guzzino*, 810 F.2d 687 (7th Cir. 1987), *cert. denied*, 481 U.S. 1030 (1988) ("[t]he relevant issue is not what a lawyer would think, but what the defendants understand").

This Court has not had occasion to construe F.R.E. 701. Trial courts routinely refuse to allow attorneys to testify as to anything other than facts. An attorney's lay opinion as to the intent, belief or feelings of the accused, or his manner, appearance or conduct—which is what the Liederman Memo contains—is something that must be avoided. *United States v. Chavis*, 772 F.2d 100 (5th Cir. 1985). "The conclusion or interpretation of a witness as to the meaning of what someone said is not admissible." *DeLoach v. United States*, 307 F.2d 653, 655 (D.C. Cir. 1962) (per Burger, J.). While arguably permitted under the language of F.R.E. 701, the great weight of authority is against such use. This Court should so hold.

The Third Circuit limits F.R.E. 701's application so as to permit lay opinion on what an accused meant or conveyed only to the instance where it is necessary to explain code words, or "code-like" (summary) remarks in recorded conversations. *United States v. Dicker*, 853 F.2d 1103, 1108-1110 (3d Cir. 1988). *See generally United States v. DePeri*, 778 F.2d 963 (3d Cir. 1985), *cert. denied sub nom., Murphy v. United States*, 757 U.S. 1110 (1986). Clear statements are not to be interpreted, *id.*; and here Liederman's testimony is that Daddona clearly said nothing about the validity of the bonds. (118a).

Another example is the case of *United States v. Cox*, 633 F.2d 871 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981). The *Cox* case was quoted by the Third Circuit, in *Dicker*, with approval, as follows:

> In that case, the defendant was convicted of possession of unregistered firearms, specifically pipe bombs. Witness Jeanette Carter responded to a question by the government by saying:
>
> > *He never actually said that*, you know, he had blown it up *but it was my understanding*, or by his mentioning that he had a friend and that when showed me the article that it was my impression when we were done talking that he was involved in having it blown up.
>
> The court, although it found the error harmless, declared that Carter's testimony should not have been admitted, because the witness' 'understanding' did not aid the triers of fact in their understanding of what the appellants had said and done. The jury could draw its own conclusions from what Carter had already testified. Her additional analysis was irrelevant and should not have been admitted.

853 F.2d at 1110, *citing*, 633 F.2d at 876 (emphasis added). *Accord, United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

The Trial Court's abuse of discretion is plain. (119a). As in *Dicker*, the Government's use of the Liederman Memo at trial and in its closing was so prejudicial to Daddona as to require reversal.[5] Without the Liederman Memo, the Government has no case against Daddona. A mail fraud conviction requires proof beyond a reasonable doubt that a false representation was made. *United States v. Regent Offices Supply Co.*, 421 F.2d 1174 (2d Cir. 1970). Nor does the statute create a duty to reveal material facts, unless the accused already had a legal duty to speak. *United States v. Chiarella*, 445 U.S. 220, 227, 100 S.Ct. 1100, 1114 (1980). The Liederman Memo is the only evidence which comes close to meeting that standard.

Unlike *Cox*, therefore, where there was "overwhelming" other evidence of guilt, here the appropriate disposition by the Court of Appeals should have been reversal of the conviction with directions to the Trial Court to enter a judgment of acquittal.

II. THIS COURT'S DECISION IN MCNALLY REQUIRES REVERSAL OF ONE COUNT OF DADDONA'S CONVICTION AND A NEW TRIAL ON THE OTHER COUNTS.

Another District Court has squarely held that York Contracting had no rights under the surety bond.

Yet, Count V of the indictment charged that Daddona committed mail fraud by causing Wausau's (we now know, *correct*) denial of York's claims. Even more to the point, York's president testified extensively at Daddona's trial about York's reliance on the L&M bond. (135a-153a). He even appears to have falsely testified that York had a contract with ECU—a complete falsehood. (139a).

In *McNally v. United States*, 483 U.S. 350, 107 S.Ct 2875 (1987), this Court held that, without a deprivation of rights, there cannot be a valid prosecution under the mail fraud statute.

5. This order, for example, prevented Daddona from moving for a new trial before the Trial Court on the basis of the October 21, 1993 decision in *York Excavating*!

Under federal law, fraud refers to wronging someone in his property rights by dishonest means or schemes. 18 U.S.C. § 1341.

The *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), the Third Circuit applied *McNally* to hold that pension fund trustees who received kickbacks for making illegal investments of pension fund moneys were not guilty of mail fraud under federal law. In *United States v. Johns*, 742 F. Supp 196 (E.D. Pa. 1990), the Court ruled the defendants could not be held guilty of mail fraud where brokers and vendors overcharged the defendants' employers and the overcharge lined the defendants' pockets.

These principles are squarely implicated by the other District Court's ruling that York, the subcontractor who received the mailing charged in Count V, had no legal right to claim under the L&M bond. Thus, York was not deprived of any "money or property." by Daddona's conduct. Daddona is thus entitled to an acquittal on Count V.

This is because there is no way the result of this trial can be purged of the effect of the Government's erroneous inclusion of Count V in the indictment or its calling of York as a witness. The only remedy is to reverse the convictions on Count V and a new trial on the remaining charges.

III. THE INCONSISTENT RULINGS BY THE COURTS BELOW ON THE ISSUE OF JURISDICTION ON DADDONA'S NEW TRIAL MOTIONS, THE DENIAL OF HIS REQUESTS FOR USE OF THE COURT'S SUBPOENA POWER AND THE ORDERS PROHIBITING HIM FROM FILING MOTIONS VIOLATED DADDONA'S RIGHT TO DUE PROCESS OF LAW AND HIS FIRST AND SIXTH AMENDMENT RIGHTS.

The lower courts' treatment of Daddona's new trial motion is unsatisfactory to any advocate of judicial consistency or the orderly administration of justice. The Trial Court ruled on June 4, 1993 that it had no jurisdiction; said the same thing on July 7; then on September 23, the Trial Court ruled it *did* have jurisdiction; on October 17, it again ruled it had jurisdiction

and ordered Daddona to file no more motions; and then on January 27, 1994, the Trial Court ruled it had no jurisdiction. A Motions Panel of the Court of Appeals denied Daddona's motion to remand three times, then issued an order pointing out the need for a remand. (93a).

As a result, no court ever actually came to grips with Daddona's new trial motion. The constitutional effect of this is that, as a result of inconsistent rulings on the jurisdiction issue, the sufficiency of Daddona's new trial motion has never been adjudicated on the merits.

Admittedly, there appears to be some confusion among the commentators as to whether a trial court may decide a new trial motion while an appeal is pending. *See* 58 Am. Jur. 2d, *New Trial*, §17 (1978 & 1993 Supp.); 3 C. Wright, A. Miller & M. Kane, *Federal Prac. & Proc.* §558, 559 (1982 & 1994 Supp.).

However, the Trial Court's failure to reach the merits[6] is inexplicable in light of this Court's precedent in *United States v. Cronic*, 466 U.S. 648 (1984). There, this Court said:

> [A] District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case.

466 U.S. 648, 667, n. 42.

Petitioner, accordingly, motioned the Court of Appeals for a remand. The Trial Court, meanwhile, twice ruled it had no jurisdiction. Then, advised of *Chronic*, it denied the original motion; but it did not reach the merits of the evidence submitted on July 7. When Petitioner re-submitted that evidence on October 15, the Trial Court summarily denied the motion and ordered Petitioner to file no more motions.

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6. In its October 19, 1993 opinion summarily denying Daddona's "renewed motion for new trial," the Trial Court said the motion was untimely. (92a). To the contrary, the evidence was submitted within days of its receipt. And the original motion was filed on June 28, 1993 - before the transcripts were received, as permitted by the Local Rules of the District. (22a; Docket #131).

Daddona need make only a brief argument to show that the record of post-trial proceedings below amounted to a denial of Daddona's Fifth Amendment right to due process and his First and Sixth Amendment rights of access to the courts, to the use of the trial court's subpoena power to compel attendance of witnesses and production of documents containing evidence favorable to him. The orders not to file motions, in particular, implicate the First Amendment.

Specifically, the Trial Court:

1. quashed subpoenas served on parties having evidence favorable to Daddona (15a; Docket #88);

2. ordered Daddona not to file any more motions before sentencing (*Id.*);

3. ordered Daddona not to file any more motions until the Court of Appeals had ruled on his appeal (24a; Docket #148; 92a);

4. denied Daddona the use of compulsory process to pursue the witnesses and develop issues uncovered by his post-trial investigation (22a; Docket #172);

5. denied Daddona's request for discovery from the government (22a; Docket #132); and

6. denied Daddona's request for a hearing on his new trial motion (*Id.*).

Perhaps even more to the point, Daddona's new trial motion has yet to be adjudicated on the merits. Since the Court of Appeals simply affirmed the Trial Court's denial of the new trial motion without appraising the merits of the evidence submitted in support of it, *no court* has looked at the newly-discovered evidence offered by Daddona on July 7, 1993, to show that his conviction was erroneous.

For these constitutional reasons, as well, Daddona's petition should be granted.

CONCLUSION

WHEREFORE, upon the facts, reasoning and authorities set forth above, Daddona's petition for issuance of a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I today served three (3) copies of the foregoing paper upon all counsel and upon the Solicitor General of the United States, by mailing said copies via first class mail, postage prepaid, to the following:

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DATED: October 13, 1994